U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 20 2016

BY ECF (REDACTED) AND FACSIMILE

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

The Government writes in response to defendant's September 18, 2016 letter and to raise two additional issues. More specifically, the Government writes (i) to withdraw its opposition to the defendant's admission of the number of consensually monitored calls between Jason Galanis and Gary Hirst in light of the parties' stipulation described below; (ii) to preclude the defendant from offering evidence that he obtained the native versions of certain files from Hodgson Russ and provided them to the Government; and (iii) in opposition to the defendant's renewed efforts to offer evidence of Tracey Hirst's medical condition.

The Parties' Agreement Regarding the Number of Calls

As Your Honor is aware, the Government intends to offer the recording of a July 28, 2010 telephone call between the defendant and Jason Galanis, which was intercepted as the result of the consensual monitoring of Galanis's phone. The Government intended to offer the call through the testimony of Pat Bowens, a FBI Supervisory Special Agent assigned to the Telecommunications Intercept and Collection Technology Unit ("TICTU") at Quantico. The defendant then sought to introduce – and the Government sought to preclude – evidence about the total number of intercepted calls between the defendant and Galanis. That issue was fully briefed and is *sub judice*.

The parties have now reached an agreement that renders the issue moot. The parties have agreed to stipulate to the authenticity and admissibility of the recording and its corresponding transcript. The Government has agreed not to call an FBI witness or to offer evidence of the consensual nature of the July 28, 2010 call and the defense has agreed not to seek the admission of evidence concerning the total number of recorded calls between the defendant and Galanis. In addition, the parties have agreed that neither party will make any arguments about the number of telephone calls between Jason Galanis and Gary Hirst. That is, the Government will not offer any evidence or make any arguments about the existence of hundreds of calls between the defendant and Galanis over both monitored and unmonitored phones. Similarly, the defendant will not make any arguments suggesting that the July 28, 2010 call should be interpreted in light of the existence of other intercepted calls between the defendant and Galanis or the alleged innocuous content of those calls. The defendant also will not suggest to the jury that there was an absence of frequent communication between himself and Galanis or that the government could have obtained phone records and/or presented such evidence to the jury but did not

Evidence Concerning Which Party First Obtained the Native Files is Improper and Should be Precluded

As Your Honor is also aware, in 2015 the Government produced to the defendant in "TIFF" format an email from Michael Hlavsa to Shant Chalian (an attorney at Hodgson Russ) and its attachments. The four attachments (the "Attachments") included the Shahini Consulting Agreement and the Shahini Warrant Agreement. On September 7, 2016, the defendant obtained the Attachments from Hodgson Russ in native format. On September 11, 2016, the defendant produced the native format files to the Government. On the evening of September 13, 2016, the defense provided notice that it intended to call an expert to testify about certain aspects of the metadata of the Attachments. On September 18, 2016, the Government noticed its own expert to testify about the metadata of the Attachments. The Government anticipates that its expert witness will testify today and the parties have agreed to stipulate to the authenticity and admissibility of the native files. The defense has indicated, however, that they intend to offer evidence that the defense first obtained the native files and provided them to the Government. Such evidence is plainly improper and should be precluded.

Not surprisingly, the Government and defense have competing views of the significance of the metadata at issue. In seeking to admit evidence that the defendant first obtained the native files and provided them to the Government, the defendant is attempting to improperly suggest that the jury should accept their view of the import of the metadata because the defense would not have turned the material over to the Government unless it was helpful to their case. In short, the defendant is attempting to improperly suggest to the jury that because he provided the native files to the Government, the evidence must have the exculpatory meaning he ascribes to it. Such an argument is no more proper than would be an attempt by the Government to argue that, for example, a document used on cross-examination by the defense was one provided by the government, and therefore has a meaning favorable to the government (even if that is the government's view of the evidence). Indeed, it is axiomatic that the lawyer's view of the evidence is not itself evidence. Counsel's view of the strategic value of the evidence is thus of no moment. Permitting the defendant to introduce evidence that his attorneys provided the native files to the Government would impermissibly permit defense counsel to vouch for their view of the evidence. Further, it would be misleading, given the fact that the Government produced tiff versions of the subject files to the defense in the first place over one year ago. Defense counsel's personal views of the evidence must not improperly color the presentation of the evidence to the jury. Accordingly, the defendant should be precluded from offering any testimony concerning the defendant's receipt of the native files and provision of those files to the Government.

Evidence of Tracey Hirst's Medical Condition is an Impermissible Attempt to Play on the Jury's Sympathies

On September 17, 2016, the Government moved to preclude defense witness Tracey Hirst, the defendant's daughter, from testifying about her chronic medical condition. In a response dated September 18, 2016, the defendant conceded that arousing sympathy is a wholly improper purpose of any such testimony. The defendant nonetheless attempts to shoehorn this improper evidence into relevant testimony by claiming that "Ms. Hirst's medical condition is relevant . . . because the May 2010 vacation [about which she will testify] was specifically intended to prepare the family psychologically for a months-long process involving two surgeries, one in the second half of 2010 and the other in early February 2011." (Sept. 17, 2016 Ltr. At 2).

That argument is simply without merit. The relevant portion of Ms. Hirst's testimony – that she was on vacation with Mr. Hirst in late May and early June of 2010 – is easily offered without reference to the *purpose* of any such vacation. Similarly, Ms. Hirst's proffered testimony[1] that she observed Mr. Galanis visit Mr. Hirst on the afternoon of May 23 can be offered without any mention of the ostensible reason for the vacation. The purported reason for the vacation adds nothing to the fundamental elements of Ms. Hirst's testimony.

The defendant's true intention in seeking to admit such evidence is rendered clear by the fact that the defendant has informed the Government that he also intends to offer as an exhibit at trial a series of Facebook messages written by Tracey Hirst concerning the May 2010 family vacation as well as her medical condition.[2] Such messages, attached in their entirety as an exhibit hereto, bely the defendant's claim that he wishes to offer evidence of Ms. Hirst's medical condition for a proper purpose. For example, the Facebook messages the defendant has provided include:

- [redacted]

[redacted]

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[1] The Government is hard pressed to address the substance of Ms. Hirst's testimony as it has not been provided with any meaningful disclosure of her prior statements or her intended testimony. In response to the Government's demand for Rule 26.2 materials, the defendant has provided the Government with approximately one-third of a page of handwritten notes which appear to contain only Ms. Hirst's pedigree information. The defendant's September 17, 2016 letter contains the first substantive information concerning the nature of Ms. Hirst's testimony.

[2] Tracey Hirst's written Facebook message are, as a separate matter, classic hearsay and are plainly inadmissible on that basis.

- [redacted]

[redacted]

Such posts are clearly of no relevance to any issue at trial. The defendant's stated intention to offer the Facebook posts as evidence at trial reveal his actual intentions – to play on the jury's sympathies and distract their attention from the evidence properly before them. Because Ms. Hirst's medical condition is wholly irrelevant to the issues to be decided by this jury, Ms. Hirst should be precluded from referencing her medication condition in her testimony.

Respectfully submitted,

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